

Michele R. Stafford, Esq. (SBN 172509)
Luz E. Mendoza, Esq. (SBN 303387)
SALTZMAN & JOHNSON LAW CORPORATION
1141 Harbor Bay Parkway, Suite 100
Alameda, California 94502
Telephone: (510) 906-4710
Email: mstafford@sjlawcorp.com
Email: lmendoza@sjlawcorp.com

Attorneys for Plaintiffs, Operating Engineers'
Health And Welfare Trust Fund for Northern California, et al.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

OPERATING ENGINEERS' HEALTH AND
WELFARE TRUST FUND FOR NORTHERN
CALIFORNIA; RUSSELL E. BURNS and JAMES
E. MURRAY, Trustees;

PENSION TRUST FUND FOR OPERATING
ENGINEERS; RUSSELL E. BURNS and JAMES E.
MURRAY, Trustees;

PENSIONED OPERATING ENGINEERS'
HEALTH AND WELFARE TRUST FUND;
RUSSELL E. BURNS and JAMES E. MURRAY,
Trustees;

OPERATING ENGINEERS AND PARTICIPATING
EMPLOYERS PRE-APPRENTICE, APPRENTICE
AND JOURNEYMEN AFFIRMATIVE ACTION
TRAINING FUND; RUSSELL E. BURNS and
JAMES E. MURRAY, Trustees;

OPERATING ENGINEERS LOCAL UNION NO. 3
VACATION, HOLIDAY AND SICK PAY TRUST
FUND; RUSSELL E. BURNS and JAMES E.
MURRAY, Trustees;

HEAVY AND HIGHWAY COMMITTEE; and

OPERATING ENGINEERS LOCAL 3 OF THE
INTERNATIONAL UNION OF OPERATING
ENGINEERS, AFL-CIO,

Plaintiffs,

v.

Case No. 3:19-cv-00710

COMPLAINT

BCJ SAND AND ROCK, INC., *aka* BCJ SAND
AND ROCK CORPORATION, a California
Corporation; JAMES SLENDER *aka* BRAD
SLENDER, an individual,

Defendants.

Parties

1. The Operating Engineers' Health and Welfare Trust Fund for Northern California (which includes the Addiction Recovery Program, Inc.) ("Health Fund"); Pension Trust Fund for Operating Engineers (which includes the Pension Plan for the Pension Trust Fund for Operating Engineers, the Rehabilitation Plan, and the Operating Engineers Annuity Plan) ("Pension Plan"); Pensioned Operating Engineers' Health and Welfare Trust Fund ("Pensioned Health Fund"); Operating Engineers and Participating Employers Pre-apprentice, Apprentice and Journeymen Affirmative Action Training Fund ("Affirmative Action Training Fund"); and the Operating Engineers Local Union No. 3 Vacation, Holiday and Sick Pay Trust Fund ("Vacation Fund") (collectively referred to hereinafter as the "Trust Funds"), are employee benefit plans as defined in the Employee Retirement Income Security Act of 1974 ("ERISA") § 3(3), 29 U.S.C. § 1002(3). Russell E. Burns and James E. Murray are Co-Chairmen of the Joint Boards of Trustees of the Health Fund, Pension Fund, Pensioned Health Fund, and Affirmative Action Training Fund and have authority to act on behalf of all Trustees of those Funds. Russell E. Burns and James E. Murray are Co-Chairmen of the Joint Boards of Trustees of the Vacation Fund and have authority to act on behalf of all Trustees of the Vacation Fund. The Trust Funds and their fiduciaries are together referred to herein as "ERISA Plaintiffs" or "Plaintiffs."

2. The Heavy and Highway Committee is a Trust established under the Labor Management Relations Act ("LMRA"), 302(c)(9), 29 U.S.C. § 186(c)(9).

3. Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL-CIO ("Union") is a labor organization as defined in § 2(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 152(5), and is represented by counsel herein for the limited purpose of collecting union dues owing as part of the subject contribution claims of Plaintiffs, and not for any other cause of action. The Union expressly reserves its rights to pursue any other cause of action

1 on its own behalf.

2 4. BCJ Sand and Rock, Inc., aka BCJ Sand and Rock Corporation, a California Corporation;
3 James Slender aka Brad Slender, an individual (“Defendants”), are employers by virtue of ERISA §
4 3(5), 29 U.S.C. § 1002(5), and NLRA § 2(2), 29 U.S.C. § 152(2).

5 Jurisdiction

6 5. Jurisdiction exists in this Court over the claims asserted by ERISA Plaintiffs by virtue of
7 ERISA § 502, 29 U.S.C. § 1132, in that Plaintiffs seek to enforce the provisions of ERISA and the terms
8 of their plans, seek to enjoin the acts and practices which violate ERISA, seek equitable relief to redress
9 such violations, and seek all other appropriate relief under ERISA.

10 6. Jurisdiction exists in this Court over all the claims by virtue of LMRA § 301, 29 U.S.C. §
11 185, in that Plaintiffs seek to enforce the terms and conditions of a valid Bargaining Agreement.

12 7. To the extent jurisdiction over any claim does not exist under ERISA or the LMRA,
13 supplemental jurisdiction exists in this Court over such claims by virtue of 29 U.S.C. § 1367 in that they
14 arise out of a common nucleus of operative facts that form the basis of the federal claims asserted
15 herein, each of which has a substantial ground in federal jurisdiction.

16 Venue

17 8. Venue is conferred upon this Court by ERISA § 502, 29 U.S.C. § 1132. Where an action
18 is brought under ERISA § 502 in a district court of the United States, it may be brought at Plaintiffs’
19 discretion, in the district where the plan is administered, where the breach took place, or where a
20 defendant resides or may be found, and process may be served in any other district where a defendant
21 resides or may be found. ERISA Plaintiffs’ Trust Funds are administered in this district at their principal
22 place of business in Alameda, California. Thus, jurisdiction and venue are properly grounded with this
23 Court.

24 9. Venue exists in this Court with respect to the claims under LMRA § 301(a), 29 U.S.C. §
25 185, as this Court has jurisdiction over the parties, as the Union maintains its principal place of business
26 in this district, its duly authorized officers or agents are engaged in representing employee members in
27 this district, and the claims arise in this district.

Intradistrict Assignment

10. The basis for assignment of this action to this Court's Oakland Division is that all of the events and omissions giving rise to Plaintiffs' claims occurred in the County of Alameda, where ERISA Plaintiffs' Funds and the Bargained Plans are administered, and where Defendants therefore failed to fulfill their statutory and contractual obligations to Plaintiffs.

Bargaining Agreements

11. Defendant James Slender aka Brad Slender ("Slender"), on behalf of Defendant BCJ Sand and Rock, Inc. aka BCJ Sand and Rock Corporation ("BCJ") entered into the Independent Northern California Construction Agreement (the "Independent Agreement") with the Union, which incorporates the Master Agreement ("Master Agreement") between the Union and the Associated General Contractors of California, Inc. Under the Independent Agreement, Defendant Slender personally guaranteed all amounts claimed herein. On or about April 19, 2016, Defendant Slender, on behalf of Defendant BCJ, entered into the Material Producers Agreement with the Union. The Independent Agreement, Master Agreement, and Material Producers Agreement are collectively referred to hereinafter as the "Bargaining Agreements." The Bargaining Agreements, which incorporate the terms of the Trust Agreements establishing the Trust Funds ("Trust Agreements"), require Defendants to provide employer contributions to Plaintiffs' Trust Funds, to the Union for union dues, and to the other plans more fully described in the Bargaining Agreements. ERISA Plaintiffs are third-party beneficiaries of the Bargaining Agreements.

12. Under the terms of the Bargaining Agreements and Trust Agreements incorporated therein, Defendants are required to pay certain contributions to the Construction Industry Force Account; Contract Administration Fund; Job Placement Center and Market Area Committee Administration Market Preservation Fund; Operating Engineers Industry Stabilization Trust Fund; and Business Development Trust Fund (including the California Alliance for Jobs) (together referred herein as "Bargained Plans"). Plaintiffs' Boards of Trustees are assigned under the Bargaining Agreements to receive and administer monies due to these Bargained Plans.

13. Under the Bargaining Agreements and Trust Agreements, which are incorporated into the

1 Bargaining Agreements and made binding on Defendants, Defendants are required to regularly pay to
2 ERISA Plaintiffs, the Bargained Plans, and the Union, certain sums of money, the amounts of which are
3 determined by the hours worked by Defendants' employees. Contributions are due on the fifteenth
4 (15th) day of the month following the month in which hours were worked, and are considered
5 delinquent if not received by the twenty-fifth (25th) day of that month. Defendants are also required,
6 pursuant to the Bargaining and Trust Agreements, to pay liquidated damages in the amount of ten
7 percent (10%) for each delinquent contribution relative to those owed pursuant to the Independent and
8 Master Agreements, and liquidated damages in the amount of fifteen percent (15%) for each delinquent
9 contribution relative to those owed pursuant to the Material Producers Agreement, but in the amount of
10 twenty percent (20%) for each delinquent contribution which is the subject of litigation, Moreover, the
11 Bargaining and Trust Agreements provide that interest accrues on delinquent contributions at the rates
12 reasonably set by the Trustees from the date they become delinquent, which is the twenty-sixth (26th)
13 day of the month in which payment was due, until paid in full.

14 14. The Bargaining Agreements and Trust Agreements further require Defendants to
15 maintain time records or time cards, and to permit an authorized Trust Fund representative to examine
16 such records of Defendants as are necessary to determine whether Defendants have made full payment
17 of all sums owed to ERISA Plaintiffs. Should an audit of Defendants' records reveal Defendants have
18 failed to provide full and prompt payment of all sums due to Plaintiffs, Defendants must reimburse
19 Plaintiffs for the amounts due, including audit fees, in addition to any other obligations pursuant to the
20 Bargaining and Trust Agreements.

21 Factual Allegations

22 15. Defendants have failed to report and pay contributions for hours worked by their
23 employees as follows: (1) during the months of July 2018, October 2018, November 2018, and
24 December 2018 on contract numbers 1066 and 1206; (2) during the months of January 2018, February
25 2018, March 2018 and April 2018 on contract number 1682; and (3) during the months of January 2018,
26 February 2018, March 2018, April 2018, May 2018, June 2018, August 2018, and September 2018 on
27 contract number 1206. Defendants have failed to pay contributions reported by Defendants as due
28

1 during the month of April 2018 on contract number 1066. Liquidated damages and interest are owed to
 2 Plaintiffs for the unpaid and late-paid contributions for the above-referenced months, as well as late-paid
 3 contributions for the months of December 2016, February 2017 through April 2018, August 2018, and
 4 September 2018 on contract number 1066.

5 16. Plaintiffs are also entitled to recover any and all other contributions, and all liquidated
 6 damages and interest on delinquent contributions not specified above, found due on timecards, audit, or
 7 otherwise, including estimated contributions for any months Defendants fail to report to Plaintiffs,
 8 through the time of Judgment. Plaintiffs reserve the right to conduct an audit to determine whether there
 9 are any additional amounts due from Defendants.

10 **FIRST CAUSE OF ACTION**
 11 **For Payment of Delinquent Contributions, Interest, Liquidated Damages,**
Attorneys' Fees and Costs Against Defendants

12 17. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 16, above.

13 18. Defendants have a contractual duty to timely pay the required contributions to Plaintiffs
 14 and the Bargained Plans, and to timely pay dues to the Union, pursuant to the Bargaining Agreements
 15 and Trust Agreements. Defendants also have a contractual duty under the Bargaining Agreements, and
 16 Trust Agreements to permit an audit of their records to determine whether they are making full and
 17 prompt payment of all sums required to be paid by them to Plaintiffs, and to pay Plaintiffs all amounts
 18 found due as a result of an audit, including audit fees.

19 19. In addition, Defendants have a statutory duty to timely make the required payments to
 20 Plaintiffs under ERISA § 515, 29 U.S.C. § 1145, and LMRA § 301(a).

21 20. By failing to make the required payments to Plaintiffs, Defendants breached the
 22 Bargaining Agreements and Trust Agreements and is in violation of ERISA § 515, 29 U.S.C. § 1145,
 23 and LMRA § 301(a).

24 21. Defendants' failure and refusal to pay the required contributions was at all times, and still
 25 is, willful. Defendants continue to breach the Bargaining Agreements, and incorporated Trust
 26 Agreements by failing to pay all amounts owed as alleged. Said refusal is unjustified and done with
 27 knowledge and intent.

22. ERISA Plaintiffs are without an adequate remedy at law and will suffer continuing and irreparable injury, loss and damage unless Defendants are ordered specifically to perform all obligations required on Defendants' part to be performed under ERISA, 29 U.S.C. §§ 1101-1381, the LMRA, 29 U.S.C. §§ 141-197, and the Bargaining Agreements and Trust Agreements, and are restrained from continuing to refuse to perform as required thereunder.

23. This Court is authorized to issue injunctive relief based on the traditional standard. As set forth above, ERISA Plaintiffs have a strong likelihood of success on the merits. There is the possibility that ERISA Plaintiffs' Trust Funds and their participants will suffer irreparable injuries. The balance of hardships and advancement of public interest favor ERISA Plaintiffs.

24. This Complaint does not in any manner relate to statutory withdrawal liability that may or may not be assessed against Defendant. ERISA Plaintiffs expressly reserve the right to pursue any such withdrawal liability claims against Defendants as provided by ERISA Plaintiffs' Plan Documents, Trust Agreements, and the law.

Prayer

WHEREFORE, Plaintiffs pray as follows:

1. For a judgment against Defendants as follows:

(a) Any unpaid contributions, due at time of Judgment, including those specified above as well as any other contributions determined as due by audit, timecards, or otherwise, including estimated contributions for any months Defendants fail to report to Plaintiffs, pursuant to ERISA § 502(g)(2)(A), 29 U.S.C. § 1132(g)(2)(A);

i. To ERISA Plaintiffs and the Bargained Plans, in accordance with ERISA § 502(g)(2)(A), 29 U.S.C. § 1132(g)(2)(A) and the Bargaining Agreements;

ii. To the Union in accordance with the Bargaining Agreements.

(b) Liquidated damages on all late-paid and unpaid contributions in an amount provided for under the Bargaining Agreements and Trust Agreements, and with respect to ERISA Plaintiffs, ERISA § 502(g)(2)(c), 29 U.S.C. § 1132(g)(2)(c).

(c) Interest on all late-paid and unpaid contributions at the rates set in accordance

1 with the Bargaining Agreements the Trust Agreements, and ERISA § 502(g)(2)(B), 29 U.S.C. §
2 1132(g)(2)(B).

3 2. Plaintiffs' reasonable attorneys' fees and costs of this action, including any audit fees, in
4 accordance with ERISA § 502(g)(2)(D) and (E), 29 U.S.C. § 1132(g)(2)(D) and (E); and in accordance
5 with the Bargaining Agreements for all Bargained Plans; and with LMRA § 301, 29 U.S.C. § 185, for all
6 Plaintiffs.

7 3. For an order,

8 (a) requiring that Defendants comply with their obligations to Plaintiffs under the
9 terms of the Bargaining Agreements and the Trust Agreements;

10 (b) enjoining Defendants from violating the terms of those documents and of ERISA;
11 and,

12 (c) enjoining Defendants from disposing of any assets until said terms have been
13 complied with, and from continuation or operation of Defendants' business until said terms have been
14 complied with.

15 4. That the Court retain jurisdiction of this case pending compliance with its orders.

16 5. For such other and further relief as the Court may deem just and proper.

17 DATED: February 8, 2019

SALTZMAN & JOHNSON LAW CORPORATION

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19 By: _____/S/
20 Luz E. Mendoza
21 Attorneys for Operating Engineers' Health And
22 Welfare Trust Fund, et al.
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